IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

DOCKET No. 91

JOHN WILEY & SONS, INC.,

Petitioner,

against

DAVID LIVINGSTON, AS PRESIDENT OF DISTRICT 65, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

CASES

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Opinions Below

The opinion of the Court of Appeals (R. 88) is reported at 313 F. 2d 52 and of the United States District Court (R. 51) at 203 F. Supp. 171.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 11, 1963 (R. 112). The petition for certiorari was filed March 15, 1963, and was granted May 13, 1963 (373 U. S. 908; R. 118). The jurisdiction of this Court rests on 62 Stat. 928; Title 28, U.S.C. § 1254 (1).

Questions Presented

(1) Where a company having a collective bargaining agreement with a union merges into a larger non-unionized company and the merged company's employees are integrated with the employees of the surviving company into a single unit not represented by the union, is the court or the arbitrator to determine whether the surviving company is contractually obligated under the collective bargaining agreement to arbitrate questions relating to the terms and conditions of employment with the surviving company?

(2) Absent a provision in the collective bargaining agreement binding successors, or an agreement by the surviving company to assume the contract, must the surviving company arbitrate the union's claim that service under the predecessor's collective bargaining agreement created such "vested" or "property" rights in the employees that the surviving company will be required for an indefinite period after the expiration of the agreement:

(a) to continue to accord to such employees seniority, job security, vacation and severance pay, and coverage under the Union Welfare Plans,

(b) to remain bound under the grievance provisions of the expired agreement to arbitrate disputes arising after the expiration of the agreement?

(3) Is the union the proper party to assert post-contract rights on behalf of the employees who are now a part of another bargaining unit which is not represented by the union?

(4) Is the court or the arbitrator to determine whether there are conditions precedent to the contractual obligation to arbitrate, and if so, whether the union has complied with them?

Statutes Involved

Labor Management Relations Act, 1947, § 301(a), 61 Stat. 156, 29 U.S.C. § 185(a):

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

New York Stock Corporation Law §90; 58 McKinney's Consolidated Laws of New York § 90:

> "*Rights of creditors of consolidated corporations.* The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any such stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consoli-

dation had been entered into; or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending."

Statement

The Proceedings

This suit was brought by the respondent (the "Union") on January 23, 1962 in the United States District Court, Southern District of New York, to compel petitioner ("Wiley") to arbitrate issues relating to a collective bargaining agreement made by the Union with Interscience Publishers, Inc. ("Interscience"), which four months prior to suit had been merged into Wiley (R. 3-42).

The District Court had jurisdiction of the suit under Sec. 301(a) of the Labor Management Relations Act.[1]

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[1] The complaint alleges jurisdiction under Sec. 301(a) of the Labor Management Relations Act, and under the U. S. Arbitration Act, Title 9, U.S.C. (R. 3). It was filed on January 23, 1962 (R. 3); the order to show cause, with petition seeking the identical relief annexed thereto was signed on January 24, 1962 (R. 43); service of the petition and order to show cause was accepted on January 25, 1962, and service of the complaint was made on January 29, 1962 (R. 73; the docket entry [R. 2] erroneously indicates that the complaint was served on January 23). The time to file an answer to the complaint has been extended by stipulation until the entry of a final order on the petition (R. 73). The case was argued on the petition, complaint and affidavits; there has been no trial. Wiley objected to the proceedings in the District Court on the ground that there was no jurisdiction under the United States Arbitration Act and therefore no justification for the summary proceedings adopted by the Union (R. 74). Although the Union subsequently characterized the proceedings as "in the nature of a motion for summary judgment", Rule 56(a) of the Federal Rules of Civil Procedure does not permit such a motion to be made prior to 20 days after service of the summons and complaint. The District Court did not decide whether it had jurisdiction under the Arbitration Act or rule directly on the propriety of the Union's procedure. The Court of Appeals merely held that the District Court had jurisdiction under Section 301 of the Labor Management Relations Act (R. 89).

The District Court denied the petition. The Court of Appeals reversed and directed arbitration in accordance with its opinion.

The Facts

Wiley and Interscience, theretofore unrelated scientific publishers, had merged for bona fide business reasons on October 2, 1961 (R. 77), four months prior to suit. Interscience, whose corporate existence was terminated by the merger (R. 77), had signed a series of collective bargaining agreements with the Union, the last of which, dated February 1, 1960, upon which the Union sues, was to expire by its terms on January 31, 1962, one week after commencement of suit (R. 4, 34, 76-77).

On October 2, 1961, the date of the merger, Interscience had eighty employees, forty of whom, clerks, stenographers, and bookkeepers, were covered by the collective bargaining agreement (R. 77). It had an office in New York City and annual sales of $1,000,000 (R. 4, 77). Wiley, the surviving company, was older, having been established in 1807, had three hundred employees, a much larger office in New York City and separate warehouse facilities in that city, an office and warehouse in Salt Lake City, and annual sales of $9,000,000 (R. 4, 77). No Wiley employees are or have been represented by a union and there is no established Wiley policy with respect to "seniority rights", "job security", "grievance procedures", or "severance pay", as those terms are used in the Union's complaint and petition (R. 77).

Following the merger, the Interscience employees were integrated into Wiley's operations, and thereafter no longer constituted a separate or distinct bargaining unit (R. 58). Neither prior to nor at any time since the merger has the Union had a collective bargaining relationship with Wiley (R. 82), nor has it claimed to represent a majority

of the Wiley employees or a majority of any appropriate collective bargaining unit in the Wiley establishment.[2]

The proposed merger was publicly announced in late May, or early June, 1961 (R. 57, 77). On June 27, 1961, the Union notified Interscience that "under the agreement between the parties, our employees are entitled to continue working, notwithstanding such joinder", that they should not be "terminated from employment", and that "any impairment" of their rights would be resisted "to the fullest possible extent under the law" (R. 57-58, 77). On the same day, the Company told the Union that it should feel free to discuss the merger with it at any time (R. 77-78).

On September 19, 1961, Interscience's counsel met with Union counsel and Union representatives. He told them that the merger would become effective on October 2, 1961, that at that time the Interscience bargaining unit would be merged into and be absorbed by the larger Wiley unit and that from and after that date the Union no longer would be recognized as the bargaining agent for those employees (R. 58-59, 78).

The Union took the view that it should continue to represent the employees after the merger, and until the expiration of the contract on the following January 31. Interscience replied that Wiley would not recognize the Union unless ordered to do so by the National Labor Relations Board, and cooperation was offered if the Union should desire to petition it for an election (R. 58).

Specifically, Interscience (on behalf of itself and Wiley) took the following position at that meeting:

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[2] The Union in this action has claimed the right to represent the former Interscience Union employees, at least for the purpose of enforcing their alleged rights under the collective bargaining agreement between the Union and Interscience, even though they no longer constitute by themselves an appropriate collective bargaining unit.

1. That the 40 Interscience employees then represented by the Union on October 2, 1961 would become Wiley employees and members of a larger bargaining unit not represented by the Union (R. 58-59).

2. That from and after October 2, 1961 Wiley would regard the Interscience union contract as ineffective, and would not recognize the Union as the bargaining agent for the former Interscience employees (R. 59).

3. That from and after October 2, 1961, no further contributions would be made to the Union Welfare and Pension Plans except to make final settlement for Interscience's liability accrued to September 30, 1961 (R. 59).

4. That as of October 2, 1961 the Interscience employees would enter the Wiley Employee Retirement Plan with full credit for past service with Interscience (R. 59).

5. That severance payments would be voluntarily made to Interscience employees for whom Wiley could not provide jobs (R. 59).

Another meeting was held on September 26, 1961 when the Union suggested, and Interscience (on behalf of Wiley) tentatively agreed, that severance payments in excess of the contract formula would be made not only to those employees whose jobs might be lost as a result of the merger but to those who might not wish to work for Wiley (R. 60).

On September 28, 1961, the Union advised Interscience that the proposed severance payment arrangement would be agreeable but insisted that the Interscience employees enter Wiley's employment with seniority rights. The Company refused. The Union said it would request advice from counsel (R. 60-61).

On the same day, Interscience sent the Union a registered letter stating:

"Gentlemen:

The merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. with Wiley remaining as the surviving corporation becomes effective on October 2, 1961 at 9:00 a.m. At that time our employees become Wiley employees and our collective bargaining agreement with you will no longer be effective except for the obligation to pay to the '65 Security Plan' the amount due for the quarter ended September 30, 1961. In due course the report for that period and the supplemental W-2 forms will be sent to you with payment for the difference between the amount shown to be due and the deposit which you are now holding for Interscience's account." (R. 78-79)

The merger was accomplished on October 2, 1961 as scheduled (R. 77). All Interscience employees on that date became Wiley employees. No one was laid off or discharged (R. 76). On that day, Wiley wrote the Union as follows:

"Gentlemen:

The merger of Interscience Publishers, Inc. into John Wiley & Sons, Inc. became effective at 9:00 a.m. today. You were recognized by Interscience Publishers, Inc. as the collective bargaining agent for its clerical and shipping employees. These employees are now Wiley employees and are a minority accretion to an identical unit of Wiley employees for which you are not the chosen collective bargaining agent.

For your information we enclose a copy of a letter which has this day been delivered to the former employees of Interscience Publishers, Inc., whom you represented before the merger." (R. 80)

The letter enclosed therewith follows:

"Dear Fellow Employee:

Until today, as an employee of Interscience Publishers, Inc. you were represented for collective bargaining purposes by District 65. By virtue of the merger between Interscience Publishers, Inc. and John Wiley & Sons, Inc. which took place today, Interscience has disappeared as a legal entity and Wiley remains as the surviving corporation. You are now a Wiley employee doing similar work as part of a larger group which is not represented by District 65. Effect therefore will not be given to the collective bargaining contract which existed between Interscience and District 65." (R. 79-80)

On October 9, 1961 final payment was made to the Union Welfare Plans with the following letter:

"Gentlemen:

We are enclosing our check in the amount of $684.06 in payment of the following:

1. Amount due to the "65 Security Plan" for the quarter ended September 30, 1961	$4,184.06
2. Less: Deposit which you are now holding for Interscience's account	3,500.00
Check enclosed	$ 684.06

The supplemental W-2 forms will be sent to you shortly." (R. 81)

The check enclosed therewith was endorsed "Final Payment from July 1, 1961 to September 31, 1961" and was deposited on October 13, 1961 (R. 81).

The Wiley Employee Retirement Plan was formally amended on the date of the merger to provide for the

entry of the Interscience employees into the Plan with credit for their service with Interscience (R. 81). Wiley's cost of funding their past service was $18,462 (R. 87).

Following the merger, four meetings were held between Wiley and the Union and their respective counsel, each without prejudice to Wiley's refusal to recognize the Union or the contract (R. 61, 64). The first took place in early November, a month after the merger (R. 61). In these talks, the Union insisted that it be recognized as the bargaining agent for the former Interscience employees during the remaining term of the contract, and that the employees' seniority be carried over to Wiley. Wiley was adamant in its refusal (R. 64). Notwithstanding its claim that it continued to represent the employees and that the contract remained effective until January 31, 1962, the Union made no effort to exercise its contract prerogatives relating to shop steward (Sec. 1.0; R. 11-12), hiring hall (Secs. 4.1-4.3; R. 14), bulletin board (Article XX; R. 32), Union visitation (Article XXIX; R. 36), and other Union rights (R. 82).

At the last of these meetings Wiley said that no employees would be dropped as a result of the merger (R. 61). Eleven employees have resigned and received severance payments voluntarily made by Wiley in exchange for general releases (R. 86-87). The remaining twenty-nine continue in Wiley's employ. None has asserted a grievance. None has raised any issue with Wiley about seniority, job security, grievance procedures, vacation pay, the adequacy of the Wiley Employee Retirement Plan or otherwise (R. 76).

The collective bargaining agreement contained the customary provision for automatic renewal unless notification was given by either party that changes in the agreement were desired (Article XXIV; R. 34). The Union gave such notification on November 24, 1961 and again on Decem-

ber 1, 1961, and the agreement expired by its terms on January 31, 1962 (R. 83-85).[3]

The grievance procedures prescribed by the agreement "were completely ignored" by the Union.[4] The issues now sought to be arbitrated were not even discussed. The conversations before and after the merger related to rights during the remaining term of the contract (R. 64, 68). And even some of these, as asserted in the complaint, were not referred to, except by the catch-all phrase "other rights" (R. 64), although the Union says that employees unnamed raised them with it (R. 67).

No claim was ever made for post-contract rights, rights for the period after January 31, 1962; nor was any demand ever made for arbitration either of contract or post-contract rights (R. 82).

In its complaint and petition, the Union sought to compel Wiley to submit the following issues to arbitration:

> "(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now *and after* January 30, 1962;[5]
>
> "(b) Whether as part of the wage structure of the employees, the Company [Wiley] is under an obligation to continue to make contributions to District 65 Se-

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[3] The Union does not contend that the Interscience agreement extended beyond January 31, 1962. Its contention is that certain rights "vested" prior to that date.

[4] This was admitted by the Union in the Turbane affidavit (R. 68) and was expressly so found by the District Court (R. 54-55). The statement by Judge Medina in the Court of Appeals that "the upshot [of the conflicting positions adopted by the parties] was that the Union demanded arbitration of the dispute, under Article XVI of the Agreement" (R. 89), is not supported in the record and is incorrect. The only demand for arbitration made by the Union was in its complaint and petition.

[5] The complaint erroneously refers to the expiration date as January 30, rather than January 31, 1962.

curity Plan and District 65 Security Plan Pension Fund now *and after* January 30, 1962;

"(c) Whether the job security and grievance provisions of the contract between the parties *shall continue* in full force and effect;

"(d) Whether the Company [Wiley] must obligate itself to continue liable now *and after* January 30, 1962 as to severance pay under the contract;

"(e) Whether the Company [Wiley] must obligate itself to continue liable now *and after* January 30, 1962 for vacation pay under the contract" (Emphasis supplied) (R. 10, 46-47).

With one exception, all of the issues relating to the contract period (expiring on January 31, 1962) are moot. What the Union seeks to arbitrate is its claim that Wiley should "commit itself" to the working conditions spelled out in the Interscience contract for an indefinite period *after* the expiration of the contract (R. 10).*

The pertinent provisions of the collective bargaining agreement between the Union and Interscience are briefly summarized below:

The bargaining unit is defined as "all clerical and shipping employees" at Interscience's office (250 Fifth Avenue, New York City) "or at any branch office of said location hereafter opened by the Employer in the greater New York Area" (Article I; R. 11-12).

A seniority list of the regular employees is to be established and maintained. Promotions, layoffs and rehiring

* See pages 34-40, *infra*. The exception is the Union's claim that Wiley is required to make a contribution to the District 65 Security Plan for the four months ending January 31, 1962.

are to be based generally on seniority (Article VI; R. 15-17). Seniority rights are lost after a lay-off of six months (Sec. 6.11(d); R. 17).

The Company is required to make quarterly payments to the "Sixty-five Security Plan" of nine percent of the total wages of the covered employees (Article XV; R. 24-27). A deposit equal to one quarterly payment was made at the inception of the agreement, to remain on deposit during its term, and was to "be returned to the Employer at the termination of this contract" (Sec. 15.1; R. 24-25). The employer's sole financial obligation under Article XV is payment of the contributions at the rate set forth (Sec. 15.4; R. 25).

The agreement reserves various rights to the sole discretion or judgment of the Employer and expressly excepts the exercise or non-exercise of such discretion or judgment from arbitration (Sec. 16.8; R. 30). In Section 6.10 the Employer reserves the sole right to determine the extent to which its establishments, in whole or in part, shall be operated or shut down (R. 17). In Section 7.2 the Employer reserves the sole and unqualified right to reduce the number of employees by discontinuance of certain lines of activities or business operations (R. 18). Section 18.0 reserves to the Employer all management rights, including the right to arrange and direct its entire working force; to determine the plan and manner of work, to decide the number and location of its establishments and the establishment, relocation, discontinuance or closing of existing departments (R. 31). In Section 18.2 the Union expressly recognizes that the organization of the Employer and the determination of the policies affecting the work assignments of its personnel are rights vested exclusively in the Employer (R. 32).

Article XVI provides for a grievance procedure culminating in a referral to arbitration (R. 27-30).

Section 16.0 provides that "any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, shall be subject to the following procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute, hereinafter referred to as 'grievance'" (R. 27).

Section 16.5 provides that "in addition to other provisions elsewhere contained in this agreement which expressly deny arbitration to specific events, situations or contract provisions * * * (3) matters not covered by this agreement; and (4) any dispute arising out of any question pertaining to the renewal or extension of this agreement" shall not be subject to arbitration (R. 29).

The grievance (or the "difference" or "dispute"), when it arises, is to be the subject of a conference by the "affected employee", with a Union steward and the Employer. In the event the grievance is not satisfactorily settled within two working days of the conclusion of the conference, the grievance is to be reduced to writing and signed by the Employer and the "affected employee" (Sec. 16.0, step 1; R. 27). The notice of grievance reduced to writing pursuant to step 1 must be filed within four weeks of its occurrence or latest existence. Failure to file the grievance "within this time limitation" is to be deemed "an abandonment" (Section 16.6; R. 29).

Within five working days thereafter the grievance is to be subject to a further conference between the Employer and the Union shop committee (Sec. 16.0, step 2; R. 27-28).

Only in the event that the grievance is not resolved or settled in step 2 is it to be arbitrated, and the parties agree to attempt to choose a mutually agreeable arbitrator. Any grievance not satisfactorily adjusted within two weeks from the step 1 conference is to be referred to arbitration

unless the time is extended in writing (Sec. 16.0, step 3; R. 28).

In the event the parties fail to agree upon an impartial arbitrator the aggrieved party is to file a demand for arbitration with the American Arbitration Association (Sec. 16.1; R. 28).

Grievances can be grouped if rising out of a "common state of facts" (Sec. 16.8; R. 29-30).

Article XVII provides that the contract shall be enforceable "only in the manner established by this contract (R. 30-31).

Article XXX provides that the agreement contains "the whole agreement of the parties", and that "there are no promises, terms, conditions or obligations referring to the subject matter thereof other than those contained herein" (Sec. 30.0; R. 36).

Decision of the District Court

The District Court assumed, for the purpose of its decision, that the agreement survived the consolidation and that Wiley was bound to observe its terms (R. 54). It held, however, that compliance with the grievance procedures prescribed in Article XVI, and in particular the filing of a notice of grievance within four weeks of its occurrence, was a "condition precedent" to the employer's obligation to arbitrate. Finding it "undisputed" that no notice of grievance was filed within the four-week period, and indeed, that all of the grievance procedures set forth in the agreement were "completely ignored", the Court held that the grievances had been abandoned (R. 54-56).

It also held that the issues tendered by the Union were not within the scope of the arbitration clause which, it said, were intended to apply only to individual grievances of an "affected employee", and not to "matters involving the entire collective bargaining unit" (R. 54-55).

Decision of the Court of Appeals

The Court of Appeals reversed and directed arbitration.

Judge Medina, writing for the Court, held that the "consolidation did not *ipso facto* terminate all rights of the Union and the employees created by or arising out of the collective bargaining agreement",[1] but did not decide what those rights were or whether they continued beyond the contract period and could be asserted against Wiley (R. 93). The Court's holding on this branch of the case was expressly limited to the requirement that Wiley *arbitrate* whether the *obligation to arbitrate* survived the consolidation; and if it did, just what employee rights, if any, survived.

It said:

> "We merely hold that, as we interpret the collective bargaining agreement before us * * *, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract.
>
> * * * [W]e think and hold, in the exercise of our duty to fashion an appropriate rule of federal labor law, that it is not too much to expect and require that this employer [Wiley] proceed to arbitration with the representatives of the Union to determine whether the *obligation to arbitrate* regarding the substantive terms of the contract survived the consolidation on October 2, 1961, and, if so, just what employee rights, if any, survived the consolidation." (Emphasis added) (R. 94-95)

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[1] This thought was also expressed by the language that "the agreement and rights arising therefrom were *not necessarily* terminated by the consolidation". (Emphasis added) (R. 90)

Judge Kaufman, concurring, explained this aspect of the decision in this language:

> "Although the collective bargaining agreement contains no express provision making its obligations binding upon the successors of the parties, our decision today, in effect, permits the arbitrator to 'imply' such a provision into the agreement if, under the circumstances present here such an implication is proper. • • • What we decide here is that since the arbitrator *may* find that the agreement was intended to bind successors, and that since Wiley is the successor of Interscience, then Wiley is a potential party to a binding arbitration decree. • • • [This] does not preclude the arbitrator from determining that Wiley was not meant to be bound by the obligations in the collective agreement—either the obligation to arbitrate or the obligation to respect the allegedly 'vested' rights of the employees." (Emphasis in original) (R. 111)

In so deciding, the Court held the Union the proper party to assert the claims since it had not been formally decertified nor was a rival union purporting to represent the employees (R. 96).

The Court held the issues tendered by the Union arbitrable, relying on the teaching of *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584-5, "that the dispute is to be arbitrated unless it is perfectly clear that it is specifically excluded" (R. 96-101).[8] The Court reached this conclusion even though the issues

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[8] At this point in its opinion, the Court states "a distinction is made, on the very face of the agreement, between ordinary grievances personal to the individual employees, on the one hand, and other, perhaps more important disputes, such as the one before us, relative to 'matters affecting the entire bargaining unit', both of which, however, are subjected to arbitration" (R. 100). This statement is presumably directed at the alternate ground upon which the District

(Footnote continued on following page)

raised related to terms of employment for a period *after* the expiration of the collective bargaining agreement and with respect to a bargaining unit *other* than the bargaining unit to which the agreement pertained. The Court reasoned that since the right to a continuation of the terms of employment beyond the term of the agreement was claimed by the Union to have "vested" during the term of the agreement, its claim involved a dispute as to the interpretation or application of the agreement, and was therefore arbitrable (R. 99).

Finally, the Court held that whether the Union had to comport with the contract grievance procedure, and if so, whether it did, and if not whether compliance was excused, were questions of "procedural arbitrability" which were to be decided by the arbitrator and not by the Court (R. 101-107).

Summary of Argument

I.

The Court of Appeals required Wiley to arbitrate whether it was bound by the obligation to arbitrate contained in the Interscience collective bargaining agreement. This is contrary to the principle that "whether or not the company is bound to arbitrate, as well as what issues it must arbitrate", must be determined by the court (*Atkin-*

(Footnote continued from preceding page)

Court rested its decision to the effect that arbitration was limited to grievances involving an "affected employee". However, Article XVI reveals no such distinction. Any "differences, grievance or dispute", without distinction, which is within the scope of Article XVI is made subject to the identical procedure, "which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute". The source of the quotation—"matters affecting the entire bargaining unit"—used by the Court is uncertain (R. 100). Such language is not contained in the contract, although similar language is used by Judge Sugarman—"matters involving the entire collective bargaining unit" (R. 55)—and possibly the reference is to his language.

son v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962)), unless there is a "clear demonstration", not present in this case, of a purpose to commit this issue itself to the arbitrator.

II.

Wiley is not obligated to arbitrate the issues tendered by the Union.

A.

The threshold question is whether Wiley is bound by Interscience's agreement to arbitrate. The Interscience agreement did not purport to bind successors and Wiley notified the Union in advance that it would not assume the agreement. The Union relies on Section 90 of the New York Stock Corporation Law to supply the nexus but the Court properly held that it does not do so. Federal and not State law is controlling and in the absence of binding authority, the Court (and not the arbitrator) is called upon to establish the applicable rule of federal common law. The question to be determined is as follows: Absent a provision binding successors in the collective bargaining contract, or an agreement express or implied to assume that contract by the surviving company to a merger, should the grievance and arbitration machinery provided for in the predecessor's contract be imposed upon the surviving company to the merger?

The principles to be applied should be drawn from decisions of the courts and the National Labor Relations Board which have considered whether an employer is required to step into the shoes of its predecessor. Of particular relevance, since labor arbitration is an adjunct to collective bargaining, is the rule stated in cases such as *N.L.R.B.* v. *Aluminum Tubular Corp.*, 299 F. 2d 595 (2d Cir. 1962), that a successor employer is not required to bargain with a certified union where there has been a

substantial change in the employment enterprise. The Court should adopt a similar rule here. In view of the substantial change in the employing enterprise and the integration of the Interscience employees into a single Wiley employee unit, Wiley should not be required to arbitrate with the Union, especially with respect to matters as to which Wiley may be called upon to bargain with the enlarged Wiley bargaining group.

B.

Not every claim is arbitrable. Even in the absence of a specific exclusion, the issues tendered for arbitration must be within the scope of the contract. A distinction must be made between a frivolous claim and a frivolous assertion that a claim is within the scope of the contract. The Union's claim, which is essentially that the employees have the right to indefinitely continue in Wiley's employ under the conditions of employment provided in the Interscience contract, cannot fairly be said to fall within the scope of that contract which dealt solely with conditions of employment in the Interscience bargaining unit during the contract period. The Court of Appeals accepted the Union's *assertion* that the right to continued employment in the Wiley unit had "vested" under the Interscience contract and therefore must be arbitrated under that contract. Instead, it should have made a critical analysis of the "vested rights" claim to determine whether the assertion that the claim falls within the scope of the contract was frivolous. The Union is not seeking to arbitrate previously earned "vested rights". It is misusing the concept of vesting to fit its claim to future working conditions so that it can appear to fall within the scope of the contract. The Court of Appeals should have decided, from the face of the claim, that it was without root or foundation in the contract and should have affirmed the District Court's dismissal of the suit.

Zdanok v. *Glidden*, 288 F. 2d 99 (2d Cir. 1961), on which the Union relied in bringing this suit, does not support its claim that the working conditions under the Interscience contract carry over, after the expiration of that contract, to the Wiley establishment. *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), cert. den. 374 U. S. 830 (1963), a later decision by the same Court, specifically limits that decision to its facts, holding that it does not "stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken" (at p. 186).

The presumption of arbitrability of the *Steelworkers* cases* on which the Court of Appeals relied does not justify the reference to arbitration. The *Steelworkers'* rule assumes that the claim whose arbitrability is questioned is "on its face governed by the contract" and that it relates to an existing collective bargaining relationship between the Union and the employer, neither of which is true in the instant case.

C.

The Union is not the proper party to enforce the rights, if any, of the employees under the Interscience contract. With the disappearance of the collective bargaining unit, its own collective bargaining agency terminated. Thereafter, it is an intruder. It loses its right to enforce its contract, whether the termination of its agency results from the certification of another union in its place, or its own decertification, or as here, by merger of the bargaining unit into a larger unit which it does not represent.

We have discussed this Point from three different aspects. The Point is really not divisible, however. The

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* *United Steelworkers* v. *American Manufacturers Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation*, 363 U. S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

single question, different in the whole from the sum of the parts, is whether Wiley can be compelled to arbitrate with the Union the particular claims which the Union asserts. For the reasons stated, and for the overriding reason that the Union's claim runs counter to all established concepts of employer-employee rights and relations, the answer must be clearly no.

III.

The Court must determine in this Section 301 action whether the defendant has breached its promise to arbitrate. While steps in the grievance procedure or the time limitations imposed thereon may be merely promissory and not conditional, the parties, if they choose, may condition their promise to arbitrate on a timely statement of grievance or demand for arbitration or on other preliminary steps. The Court when called upon to enforce the promise must first determine whether conditions precedent have been prescribed, and if so, whether they have been performed or excused.

The District Court properly found that the Union made no effort to comply with any of the contract grievance procedures and that in effect it had "abandoned" its claims. The Union made no demand for arbitration prior to suit. It did not even state the issues it tenders for arbitration which, insofar as they are not moot, relate only to post-contract working conditions.

The Union's failure to take the basic steps preliminary to arbitration was not merely a failure to comply with conditions precedent to arbitration. It was in effect an election to surrender the right to arbitrate in favor of negotiation.

The District Court properly dismissed the Union's suit. The Court of Appeals erroneously reversed and directed arbitration of questions not within the province of the arbitrator to decide.

ARGUMENT

POINT I

The Court should have determined whether Wiley is obligated to arbitrate the issues tendered by the Union and should not have referred that question to arbitration.

This is an action to compel arbitration under Section 301 of the Labor Management Relations Act. It is an action to enforce a promise. To succeed, the plaintiff must establish, to the satisfaction of the Court, (1) a promise to arbitrate, binding upon the defendant, (2) issues tendered for arbitration which are within the scope of the promise to arbitrate, and (3) a breach of the promise.

The obligation of the Court to decide these threshold questions was clearly stated in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960):

> "The Congress . . . has by Section 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached its promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,"

and in *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962):

> "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."

See also, *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 570-71 (concurring opinion) (1960); *Drake*

Bakeries v. *Bakery Workers*, 370 U. S. 254, 256 (1962); *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), cert den. 374 U. S. 830 (963); *Local Union 998, United Automobile Workers* v. *B & T Metals Co.*, —— F. 2d ——, 61 CCH Lab. Cas. ¶ 18,191 (6th Cir. 1963).

Professor Cox put it this way:

> "Section 301 covers only 'suits for violations of contracts,' which means suits to enforce a promise or to recover damages for the breach. Two conclusions follow logically: (1) that the plaintiff must lose unless he shows nonperformance of a promise to arbitrate; (2) that the court must decide whether the plaintiff has made his case." *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1507 (1959).

The Court of Appeals has required Wiley to arbitrate whether it is bound by Interscience's "obligation to arbitrate" rather than decide the question itself (R. 94, 95). That in this case the determination turns not upon Wiley's own contractual undertaking, but upon whether Wiley is bound by a contract made by its "predecessor" Interscience, does not alter the principle involved. Wiley's obligation to arbitrate, if it exists at all, must be found in a contract which expressly or by implication is binding upon it, and it is the responsibility of the Court to make that determination, and not to refer the question to arbitration.

A party, of course, may contract to refer the question of arbitrability to an arbitrator, in which case a refusal to arbitrate on the ground that the grievance is not arbitrable would itself be a breach of contract. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 571 (1960) (Brennan, J., concurring). Where a party asserts that that is the case, he "must bear the burden of a 'clear demonstration' of that purpose." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, fn. 7 at 583 (1960).

There was no such assertion in this case and there certainly was no "clear demonstration" of such purpose. The Court of Appeals has applied the rule in reverse, submitting the issue of arbitrability to the arbitrator because *Wiley* has not demonstrated the parties' intention to *exclude* the issue of arbitrability from the arbitrator.*

We think the Court was misled by its preoccupation with the question whether the merger "necessarily terminated" the Interscience contract. The "first and preliminary question" to be decided was not whether the Interscience contract had been *terminated* by the merger (R. 93) but whether Wiley, expressly or by implication, had become *obligated* under that contract to arbitrate the tendered issues with the Union. (See Point II.) That was for the Court to decide, and the reference of that question to the arbitrator was error.

POINT II

Wiley is not obligated either expressly or by implication to arbitrate the issues tendered by the Union.

A.

Wiley is not bound to arbitrate with the Union.

The threshold question for decision by the Court is whether Wiley is bound by Interscience's agreement to arbitrate.

The Interscience contract did not purport to bind successors and Wiley did not agree to be bound. On the con-

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* Judge Medina said:

> ". . . we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract . . ." (R. 94).

Judge Kaufman said:

> "We hold [that the agreement] does not clearly remove [the question] from the scope of arbitration" (R. 110).

trary, it notified the Union in advance that it would not assume the contract or recognize the Union.

To supply the essential nexus, the Union argues that Wiley is bound by Section 90 of the New York State Corporation Law[10] to assume Interscience's obligation to arbitrate with it. Wiley denied the applicability of that Section and the Court below agreed.[11]

State law is not to control, *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957), and because this is the first time the question has been presented in a Section 301 action, the applicable federal common law must be established.

The question to be determined (by the Court and not the arbitrator) can be stated in this manner: Absent a provision binding successors in the collective bargaining contract, or an agreement express or implied to assume the obligations of that contract by the surviving company in a merger, should the grievance and arbitration machinery provided for in that contract be imposed upon the surviving company to the merger?

The Court of Appeals refused to pass on the question other than to decide that the Interscience contract was not "*ipso facto*" terminated by the merger, and it delegated to the arbitrator the duty to make the decision. We have already argued the error of this referral. (Point I.)

Whether the "successor" is a successor by merger, as here, or a successor through purchase or reorganization or otherwise, is a technicality of no importance to those concerned with the bargaining unit. And those concerned with the bargaining unit, management as well as labor,

[10] Quoted at pages 3-4, *supra*.

[11] The closely written merger and consolidation statutes of the several states were obviously not written with this kind of question in mind.

are equally indifferent whether the question arises, as here, in an action to enforce a collective bargaining contract or in a representation proceeding or a proceeding to enforce bargaining rights before the National Labor Relations Board.

What is of basic importance to the parties is whether the bargaining unit continues in existence, and if so whether the employing enterprise, regardless of its ownership, remains basically the same.

If these conditions continue, the collective bargaining relationship and all that it implies, including the adjunctive remedy of arbitration,[12] continue as before. If the conditions no longer exist, the collective bargaining relationship and the adjunctive remedies, including arbitration, are no longer appropriate.

There are many decisions which lead to this principle. Some deal directly with the question whether a "successor" is required to arbitrate under a collective bargaining agreement entered into by another employer. In *Livingston* v. *Gindoff Textile Corp.*, 191 F. Supp. 135 (S.D.N.Y. 1961), the Union sought to require a new corporation (Berlin) formed by certain minority stockholders of a dissolved corporation (Gindoff) to submit to arbitration under the terms of an agreement made with the dissolved corporation. The court denied the Union's application, basing its decision on material differences between the corporations in control, location and volume of business, all factors present in the case at bar.[13]

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[12] Arbitration is a part of the bargaining process itself. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960).

[13] The Court of Appeals distinguished this case on the ground that it involved a dissolution (and reincorporation) rather than a consolidation (Court's footnote at R. 96). However, the formalities of corporation law should not govern the issue presented. The "factual relationship" between the predecessor and the successor was substantially no different than the relationship between Interscience

(Footnote continued on following page)

Other decisions have dealt with whether the new employer is bound by the collective bargaining agreement of the former employer. See, for example, *Administrative Decision of General Counsel*, Case No. SR-1880, 50 LRRM 1078, 1962 CCH NLRB ¶ 11,208; *Administrative Decision of General Counsel*, Case No. K-313, 37 LRRM 1457 (1956); *Administrative Decision of General Counsel*, Case No. K-64, 36 LRRM 1521 (1955), holding that a purchaser of business assets is not required to recognize the collective bargaining agreement of the former employer.

In *L. B. Spear & Co.*, 106 NLRB 687 (1953), the Board held that where as a result of the acquisition by one company of 92% of the stock of another the operations of the two companies were integrated, a collective bargaining agreement with one of the companies would not under the Board's "contract bar" rule bar a representation election under Section 9(c) of the National Labor Relations Act.

Many cases have involved the question whether a successor employer is required to assume its predecessor's obligation to bargain with a recently certified union. The following is a sampling of cases holding that there is no obligation to bargain with the union; *N.L.R.B.* v. *Aluminum Tubular Corp.*, 299 F. 2d 595 (2d Cir. 1962) (a smaller business absorbed into a larger one); *N.L.R.B.* v. *Alamo White Truck Service Co.*, 273 F. 2d 238 (5th Cir. 1959) (change of status from a branch of a nation-wide corporation to an independently owned business); *N.L.R.B.* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (10th Cir. 1953) (purchase of assets and continuance in part of op-

(Footnote continued from preceding page)
and Wiley. See also *Matter of Livingston*, New York Law Journal, Dec. 12, 1961, page 13, 43 CCH Lab. Cas. ¶ 50,417 (Sp. Term, N. Y. Co. 1961), the same case in the New York courts; *Office Employees International Union* v. *Ward-Garcia Corp.*, 42 CCH Lab. Cas. ¶ 16,766 (S.D.N.Y. 1961); *Copenhagen Castle Beer Corp.* v. *Beer Drivers Local Union No. 21, CIO*, 126 NYLJ 262 (Aug. 15, 1951), 20 CCH Lab. Cas. ¶ 66,511 (Sp. Term 1951); *Application of Swift & Co.*, 76 N.Y.S. 2d 881 (Sp. Term 1947).

erations); *Hooker Electrochemical*, 116 N.L.R.B. 1393 (1956) (integration of smaller unit into larger operation); *Administrative Decision of General Counsel*, Case No. SR-1446, 48 LRRM 1519, 1961 CCH NLRB ¶ 10,287 (merger of two companies); *Administrative Decision of General Counsel*, Case No. K-346, 37 LRRM 1472 (1956) (integration of operations and minority status of former employees of predecessor).

The rule was succinctly stated in *Cruse Motors, Inc.*, 105 N.L.R.B. 242, 247 (1953), quoted with approval by the Court of Appeals for the Second Circuit in *N.L.R.B.* v. *Aluminum Tubular Corp., supra*, at page 598:

> "'A mere change in ownership of the employment enterprise is not so unusual a circumstance as to affect the certification. Where the enterprise remains essentially the same, the obligation to bargain of a prior employer devolves upon his successor in title.
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> "'Where, however, *the nature or extent of the employing enterprise*, or *the work of the employees*, is *substantially changed*, the transfer *of a part*, or even all, of the physical assets does not carry along with it the duty of the former owner to continue bargaining with the former exclusive representative [citations omitted]. The purchaser in such a situation is not a successor employer. The controlling fact in each case is therefore *whether the employment enterprise substantially or essentially continues* under the new ownership as before'." (Emphasis added.)

There is impelling reason to adapt and apply that rule here. Wiley is an entirely different employing enterprise from Interscience. The former Interscience employees have lost their group identity and have been absorbed in the single Wiley bargaining unit. The Union in effect is

an intruder, having no relationship with Wiley. Under the circumstances, there can be no justification for the imposition of a duty upon Wiley to arbitrate with the Union, particularly with reference to issues which Wiley may be called upon to bargain with its own enlarged bargaining unit.

The Court of Appeals attempted to distinguish *Cruse Motors* and *Aluminum Tubular Corp.* It said that the controlling principle in those and similar cases, that employees should be afforded the opportunity to select another union which may better serve their interests where there has been a substantial change in the employment enterprise, has no application to this case where "the binding character and meaning of contractual rights under a preexisting agreement" is at issue (fn. 3, R. 95, 96). We think the distinction is one of detail and not of substance. The principle logically should apply with equal force to the Union's position in arbitration as well as in bargaining when the matters in issue apply, as here, to current and future working conditions. In either case, whether for bargaining or arbitrating, the employees should have the right to be served by another union, or no union at all.

Interscience's obligation to arbitrate with the Union was not assumed by Wiley and there is no justification in the facts of this case to impose that obligation on Wiley by implication or by operation of law.

B.

The issues tendered for arbitration are not arbitrable under the Interscience contract.

Not every claim is arbitrable. The right to arbitrate is not unlimited, even in the absence of a specific exclusion,

since arbitration necessarily is limited to a claim "within the scope of the contract". Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1500-1517 (1959); Hays, *The Supreme Court and Labor Law*, October Term, 1959, 60 Colum. L. Rev. 901, 931 (1960). Cf. *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 568 (1960).

In ascertaining whether a claim is within the scope of the contract, the Court must draw the crucial distinction between a frivolous claim within the scope of the contract and a frivolous assertion that a claim is within the scope of the contract. As Professor Cox has stated:

> "[A]rbitration should be ordered in an action under section 301 whenever the claim might *fairly* be said to fall within the scope of the collective bargaining agreement. If the latter contention be made but is patently frivolous, arbitration should be denied." (Emphasis supplied)[14]

Judge (then Professor) Paul R. Hays strongly endorses Professor Cox's statement and comments that "difficult as the application of this distinction may be [between a frivolous claim that is within the scope of the agreement and a frivolous assertion that a claim is within the scope of the agreement], it is basic to the determination of the

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[14] Cox, *supra*, at 1516. In an earlier article, Professor Cox expressed the thought in this language:

> "[T]he court's role is limited to determining whether the moving party is *really* basing its claim on the contract or is seeking to have the arbitrator decide according to equity and sound industrial relations. In the latter event arbitration should be denied". (emphasis supplied) Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 261 (1958).

place of the courts in the arbitration process". Hays, *supra*, at 931.[15]

The claims which the Union seeks to arbitrate cannot fairly be said to fall within the scope of the contract. The contract dealt exclusively with conditions of employment in the Interscience bargaining unit during the life of the contract. The bargaining unit was limited to employees at Interscience's 250 Fifth Avenue location, "or at any branch office of said location hereafter opened by the Employer [Interscience] in the Greater New York area" (Sec. 1.1, R. 12).[16] The agreement was to "continue in full force and effect for a term of two (2) years ending January 31, 1962" (Sec. 24.0, R. 34). It specifically provided that it contained "the whole agreement of the parties" and that "there are no promises, terms, conditions or obligations referring to the subject matter thereof other than those contained herein" (Sec. 30.0; R. 36). It did not contain the customary "successor" clause.[17]

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[15] Judge Hays stated that this distinction had been "ignored" by this Court in the *Steelworkers* cases. While the court did not expressly discuss the distinction, the issue apparently not having been raised, it did state that the court must determine whether the claim was "on its face governed by the contract" (*United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 568), and cited and quoted with approval the two articles by Professor Cox to which we have referred at footnote 14, *supra* (363 U. S. 564, 568; 363 U. S. 574, 583). The inapplicability of the rules laid down in the *Steelworkers* cases to the case at bar is hereafter discussed. See page 42, *infra*.

[16] Interscience's office was closed as a result of the merger. Wiley's much larger office can hardly be considered a "branch" thereafter "opened" by Interscience.

[17] "Successors clauses are commonly found in collective bargaining agreements." See *Parker* v. *Borock*, 5 N. Y. 2d 156, 161, 182 N.Y.S. 2d 577, 581, 156 N. E. 2d 297, 299 (1959); *Matter of Acme Backing Corporation* [District 65], 2 N. Y. 2d 963, 964, 162 N.Y.S.

(Footnote continued on following page)

The agreement dealt only with the conditions of employment in the bargaining unit and during the contract term. It did not deal with conditions of employment in a different bargaining unit or for the period after the contract had expired, matters to which the Union's claims are addressed.

The Court of Appeals accepted the Union's *assertion* that the right to work for Wiley under the conditions of employment stated in the Interscience contract "vested" under that contract, and therefore must be arbitrated under that contract. Instead, it should have made a critical analysis of the Union's "vested rights" theory to determine whether the assertion that the claim falls within the scope of the contract was frivolous. The Union is not seeking, as the Court supposed, to arbitrate the existence and enforcement of commonly recognized "vested rights" which had previously been "earned" or "accrued". The Union's claims are of an entirely different character, and its misuse of the concept of "vesting" in order to fit the claims within the scope of the contract is clearly frivolous and should not have been accepted at face value by the Court.

The Court did not meet its responsibility by suggesting that court enforcement of an arbitrator's award would be refused if, "although purporting to define and implement rights accruing under the contract although matur-

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(*Footnote continued from preceding page*)

2d 363, 364, 142 N. E. 2d 427 (1957); *Matter of Mineola Manufacturing Company*, 146 New York Law Journal, page 9, August 15, 1961, 43 CCH Lab. Cas. ¶ 17,135 (Sup. Ct. Nassau Co.) (involving another District 65 contract); 2 BNA, *Collective Bargaining, Negotiations & Contracts*, page 70:181.

The Court of Appeals nevertheless said:

> "And we reach this conclusion [that the consolidation did not *ipso facto* terminate all rights] despite the fact that the agreement contains no statement that its terms are to be binding upon Interscience 'and its successors', and the further fact that neither of the parties had a possible consolidation in mind when the terms of the agreement were negotiated and settled." (R. 93)

ing thereafter, he [the arbitrator] should make an award which is completely without root and foundation" in the contract (fn. 5, R. 98, 99). It should have decided, from its very nature, that the claim as a matter of law was completely without root or foundation in the contract and it should therefore have refused to make the reference to arbitration.

If the Court, when called upon to, refuses to make this kind of preliminary decision, the obvious intent of the parties to place some limit on the authority of the arbitrator will be nullified, unless the parties are resourceful enough to specifically exclude from arbitration all matters, no matter how far removed from the contract, to which the authority of the arbitrator is not to extend.[18]

The rights claimed on their face (R. 10) do not have their root or foundation in the Interscience contract, and the Court should have so decided. A summary follows of the claimed rights:

(1) "Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962."

Article VI of the agreement provides that whenever practicable, seniority shall govern promotions, the filling of vacancies, layoffs and rehiring. The Union asserts that Wiley should be required to establish a seniority list for the period after January 31, 1962, and after

[18] See Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1422, 1500-01. We concede that a determination that the claim is *not* within the scope of the contract will frequently involve the merits of the claim. In view of the broad scope of collective bargaining agreements such a determination will be comparatively rare and in most instances the merits of the claim will be referred to the arbitrator. However, unless the Court is to abdicate its proper role in the arbitral process, it must on occasion consider the merits of a claim if necessary to determine whether it is within the scope of the contract.

that date make promotions, fill vacancies, lay off and rehire employees on the basis of seniority. Neither the Union nor the Court of Appeals has suggested how the alleged seniority rights are to be applied with respect to other employees (Interscience and Wiley) who comprise ninety percent of the enlarged bargaining unit.

The rights asserted by the Union should be distinguished from the recall rights recognized in *Zdanok* v. *Glidden*, 288 F. 2d 99 (2 Cir. 1961), affirmed on another issue 370 U. S. 530 (1963). In *Zdanok*, the agreement provided that laid-off employees with five years seniority should have recall rights for three years after layoff. During the term of the collective bargaining agreement, the employer laid off the plaintiff employees, terminated its operations at the plant where they had been working and removed to a new plant in another state. The Court held that the employees' rights to recall arose during the term of the agreement when they were laid off and were intended to survive the termination of the agreement and the transfer of operations elsewhere.[19]

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[19] Although as a question of contract interpretation the result reached by the Court of Appeals may have been correct, the rationale advanced by Judge Madden, writing for the majority, and particularly the language used, appears unsound. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1553 (1962). Professor Aaron makes this comment:

> "In the absence of specific language in the collective agreement to the contrary, however, the rule has always been—as stated in the leading case of *System Fed'n 59* v. *Louisiana & Ark. Ry.* [119 F. 2d 509 (5th Cir. 1941)]—that with reference to seniority, 'collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions . . .'" (*Ibid.* at 1542)

The Second Circuit, in a later decision written by Judge Hays strictly limited *Zdanok* to its facts and stated that the decision "cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken". *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (1962), cert. den. 374 U. S. 830 (1963), discussed at pages 40-42, *infra*.

In contrast, there has been no event here during the term of the agreement which would have brought the seniority provisions or the right to recall into operation. The Union simply seeks to extend the seniority provisions of the Interscience contract beyond its term and to the entirely different Wiley establishment.

(2) "Whether, as part of the wage structure of the employees, the Company [Wiley] is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962."

The right of an employee to a pension which has vested during the contract period does not terminate upon the expiration of the contract any more than does his right to wages earned but unpaid at the expiration of the contract. We have no quarrel with the cases cited by the Court of Appeals which merely affirm this principle.[20]

The Union's claim is not that the employees have been deprived of any rights vested under the Plans (which are administered by the Union and over which Wiley has no control), but that the employees have a "vested" right to require continued contributions to the Plans by Wiley after January 31, 1962.[21]

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[20] *New York City Omnibus Corp.* v. *Quill*, 189 Misc. 892, 73 N.Y.S. 2d 289 (Sup. Ct. 1947), modified on other grounds, 272 App. Div. 1015, 74 N.Y.S. 2d 925 (1st Dept. 1947), affirmed, 297 N. Y. 832, 78 N. E. 2d 859 (1948); *Roddy* v. *Valentine*, 268 N. Y. 228, 197 N. E. 260 (1935). See Note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights*, 54 Nw. U. L. Rev. 646, 648 (1959). Compare *Schneider* v. *McKesson and Robbins*, 254 F. 2d 827 (2d Cir. 1958) and *Finnell* v. *Cramet, Inc.*, 289 F. 2d 409 (6th Cir. 1961), where the employees' rights in the pension plan had not become vested.

[21] Whether the Union employees have vested rights under the Union Welfare and Pension Plans depends upon the terms of those Plans and does not involve the interpretation or application of the collective bargaining agreement.

With equal logic the Union could insist on arbitrating a "vested right" to require Wiley to continue indefinitely to pay the wage rates in effect at the expiration of the contract.[22]

(3) "Whether the job security . . . provisions of the contract between the parties shall continue in full force and effect."

The reference to the "job security" provisions is not clear. It could refer either to the so-called "Basic Crew Clause" referred to in paragraph 14 of the Union's complaint (R. 9) or to Article VII (Discharges and Lay-offs) of the contract which limits the Employer's right to discharge and discipline employees to "just cause" (R. 17-18). Either would be consistent with the essential nature of the Union's claim, which is that the employees are entitled to continue to work under the terms of the Interscience contract for an indefinite period after its expiration.

The "Basic Crew Clause" provisions were confined to the term of the collective bargaining agreement and related expressly to the Interscience collective bargaining unit (R. 38-39). The Discharge and Layoff provisions were also clearly so limited (Sec. 24.0; R. 34). The Union asserts the right to arbitrate whether these provisions shall continue in full force and effect after January 31, 1962, and after the disappearance of the collective bargaining unit to which they related. There is no such right. See, *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), cert. den. 374 U. S. 830 (1963), involving an unsuccessful attempt to arbitrate post-contract disciplinary action, discussed at pages 40-42, *infra*.

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[22] In its petition, the Union quoted the following statement:

"Presumably, if one accepts the idea that seniority becomes a vested right, there is no reason to prevent carrying the thought to its logical conclusion and assume that a wage rate, once earned, is also a vested right." (R. 46)

(4) "Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract."

This is the only instance in which the Union alleges the existence of a right which may have accrued during the contract period.[23] To the extent that the Union asserts that the right to severance pay accrued on or prior to January 31, 1962, although payable at some future date, the issue, arguably, would involve the interpretation of the Interscience contract and be arbitrable as against Interscience.[24] However, the Union's claim is much broader; it asserts that if an employee is laid off after January 31, 1962, he will be entitled to severance payments measured not only by the length of his service with Interscience but also by his additional service with Wiley.

In re Potoker, 286 App. Div. 733, 146 N.Y.S. 2d 616 (1st Dept. 1955), aff'd *sub nom. Potoker* v. *Brooklyn Eagle, Inc.*, 2 N. Y. 2d 553, 161 N.Y.S. 2d 609, 141 N. E. 2d 841 (1957), cited by the Court of Appeals (R. 97), involved a claim that severance pay had accrued under the contract, and not a claim as here, to a right to accrue severance pay in the future, after termination of the contract. Compare *Owens* v. *Press Publishing Co.*, 20 N. J. 537, 120 A. 2d 442 (1956).

(5) "Whether the Company [Wiley] must obligate itself to continue liable now and after January 30, 1962, for vacation pay under the contract."

The Union's claim is not that the Union employees accrued vacation pay up to January 31, 1962—all such ac-

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[23] In addition, of course, to the claim for contributions to the Union Welfare and Pension Plans for the four months ending January 31, 1962.

[24] But even in this limited form the issue should not be arbitrable as against Wiley. See subpoint A, *supra*, and subpoint C, *infra*.

crued vacation pay has been paid—but that the Union employees have the right to accrue future vacation pay, at the rate fixed by the terms of the agreement with Interscience, for service after January 31, 1962, with Wiley.

In re Wil-low Cafeterias, Inc., 111 F. 2d 429 (2 Cir. 1940), cited by the Court of Appeals (R. 97), does not hold or even intimate that the *rate* of vacation pay or the right to accrue vacation pay in the future survives the expiration of the contract. That case dealt solely with vacation pay that had been earned during the contract period.[25] *Botany Mills, Inc.* v. *Textile Workers Union of America*, AFL-CIO, 50 N. J. Super. 18, 141 A. 2d 107 (1958), cited by the Court of Appeals (R. 97), also involves earned vacation pay, not the right to earn it in the future.

(6) "Whether the . . . grievance provisions of the contract between the parties shall continue in full force and effect."

The Union refers to the grievance and arbitration provisions of Article XVI of the collective bargaining agreement which relate only to the Interscience collective bargaining unit. The Union contends that these grievance and arbitration provisions "continue in full force and effect" not merely with respect to grievances which arose during or pertain to the contract term but also with respect to differences, grievances and disputes which may arise in the Wiley unit in the future.

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[25] There an employee filed a claim in bankruptcy for one week's vacation pay which had accrued prior to the bankruptcy of the employer. The only issue in the case was whether the debtor, who had previously filed a petition for reorganization, had power to enter into the collective bargaining agreement under which the vacation pay was earned. The court, at page 432, stated:

> "The consideration for the contract to pay for a week's vacation had been furnished, that is to say, one year's service had been rendered prior to June 1, so that the week's vacation with pay was completely earned and only the time of receiving it was postponed."

Procter & Gamble Independent Union v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (2d Cir. 1962), cert. den. 374 U. S. 830 (1963), holds squarely that grievance provisions do not remain in effect beyond the contract term. The Court said that the right to arbitrate is a right belonging to the Union and not to the employees,[*] that it depends on the existence of an agreement to arbitrate and that it does not carry over beyond the expiration of that agreement.

Procter & Gamble establishes the frivolity of the claim that the grievance provisions of the Interscience contract carry over beyond the expiration of that contract. It also establishes the frivolity of the Union's assertion that the claims "vested" during the term of the Interscience contract.

That case involved a contract which expired by its terms on May 13 and was not replaced by a new agreement until the following June 23rd. In the interim, grievances arose which would have been arbitrable under the contract had it remained in effect. The Union demanded arbitration; the employer refused. The District Court granted the Union's motion for summary judgment and the Court of Appeals reversed.

In reversing, the Court said that the contract had expired and that

> "there is no ground whatever for considering that the old agreement still governs the relationship of the parties." (at p. 184)

It said that *Zdanok* v. *Glidden*, 288 F. 2d 99 (2 Cir. 1961), provides no support for the suggestion that the right to arbitrate carries over beyond the contract period as an incident of a continuing employer-employee relationship.

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[*] The *Procter & Gamble* and the Interscience contracts in this respect are the same, each granting the right to arbitrate to the Union.

It further said:

> "We believe, however, that we should say that Zdanok cannot properly be read to govern situations which are not strictly within the facts there presented. More particularly the case cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken." (at p. 186)

Procter & Gamble, decided a month earlier than the instant case by a different panel of the same Court, is in basic conflict with the decision rendered below.

In each case, the Union contended that job security and grievance and arbitration provisions survived the expiration of the contract.

In *Procter & Gamble*, the Court denied arbitration. In this case it directed arbitration.

The difference appears to turn on the verbiage used. Because in *Procter & Gamble*, the Union asserted that rights continued beyond the contract term, on the theory that they were part of a *continuing* employer-employee relationship, its request to arbitrate was refused. Because the Union here asserted that similar rights "vested" *during* the contract term, and *therefore* continued thereafter, its request to arbitrate was granted.[37]

We think the Court in *Procter & Gamble*, was clearly right. We think the Court below was clearly wrong. *Zdanok* v. *Glidden*, upon which the Union relied in bringing this suit (Petition, Pars. 5, 6; R. 46), does not hold that contractual obligations continue beyond the period for which

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[37] And this, notwithstanding that the employer and the collective bargaining unit remained the same in *Procter & Gamble*, whereas here the employing enterprise is entirely different and the collective bargaining unit has disappeared.

they were expressly undertaken. Rights to seniority and to grievance and arbitration procedures, and to continued contributions to Welfare Plans, and to severance and vacation pay for future service do not "vest" during the contract period in the sense that they can carry over "beyond the period for which they were expressly undertaken."

The Court of Appeals in holding the issues arbitrable stated its reliance on the *Steelworkers* cases, "that the dispute is to be arbitrated unless it is perfectly clear that it is specifically and plainly excluded" (R. 100).[29] It failed to recognize that that presumption of arbitrability rests on the premise that the claim tendered for arbitration can fairly be said to fall within the scope of the contract.

We read the teaching of the *Steelworkers* cases to be that where the claim "on its face is *governed by the contract*" (emphasis supplied), it must be arbitrated even though the claim itself is frivolous (the issue in *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564), unless it is explicitly excluded (the issue in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574). This Court in those cases assumed that the claims were "governed by" or were "within the scope" of the contract. Nothing in those cases is inconsistent with the principle that a court must deny arbitration of a claim which may not fairly be said to fall within the scope of the contract.[29]

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[29] In an appropriate context, this would seem to be a reasonable restatement of the rule. In *United Steelworkers* v. *American Mfg. Co.*, 36 U. S. 564, 568, the function of the court in determining arbitrability was "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract". Justice Brennan, concurring, referred to the "presumption of arbitrability" that exists in disputes arising out of collective agreements. 363 U. S. 573. In *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581, it was stated that "apart from matters that the parties specifically exclude, all the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement".

[29] See footnote 15, page 32, *supra*.

We also believe that the rule of the *Steelworkers* cases assumes that the claim relates to an existing collective bargaining relationship between the union and the employer, which is not to be found here.

The collective bargaining agreement is a "generalized code" covering the "whole employment relationship" (363 U. S. 578-9); "a system of industrial self-government" (363 U. S. 580) instituted by the parties with the intent that gaps be filled in by the arbitrator by reference to "the common law of the shop" (363 U. S. 580-82). Arbitration is "part and parcel of the collective bargaining process itself" (363 U. S. 578), and the grievance procedure "a part of the continuous collective bargaining process" (363 U. S. 581). The arbitrator's role is to accommodate the interests of the parties "by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties" (363 U. S. 581). It is upon these premises that the broad presumption rests that the parties intended to arbitrate all disputes within the scope of the contract that pertain to the collective bargaining relationship.

There is no justification for assuming that the parties intended to arbitrate claims which would usurp, not supplement, the bargaining process by compelling the arbitration of the conditions of post-contract employment which are properly the subject of future bargaining by the employer and the employees or their designated representatives.[20] Nor can the parties be presumed to have intended to arbitrate claims which do not pertain to the collective bargaining unit or the period of time with respect to which and con-

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[20] See *Boston Printing Pressmen's Union* v. *Potter Press*, 241 F. 2d 787 (1st Cir. 1957), cert. den. 355 U. S. 817 (1957) (where the Court held that arbitration may not be used for the purpose of "establishing future labor conditions not specifically envisaged" in the earlier contract).

fined to which the system of self-government under the collective bargaining agreement was erected. Nor is it reasonable to suppose that arbitration was intended on issues which involve parties not joined together in a collective bargaining relationship.

The implications of the issues raised by the Union go far beyond the limits of the collective bargaining relationship, extending to the indefinite future and possibly overlapping new and entirely different collective bargaining relationships.

Claims such as these, if seriously advanced, require a judicial answer and not an arbitrator's award. An arbitrator applies techniques based not upon law but industrial expediency.[31] Indeed, he "has no obligation to apply the law even as he understands it."[32] Surely, claims of such "unknown and unforeseen character" as those the Union makes here are not to be weighed and decided in this manner.[33]

The claims tendered for arbitration are not arbitrable under the contract, and the District Court properly dismissed the suit.

C.

The Union is not the proper party to enforce the "property rights" asserted for the former Interscience employees.

Assuming, as contended by the Union, that the former Interscience employees have certain "property rights" which survived the termination of the contract, the ques-

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[31] Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U.L. Rev. 471, 482 (1962).

[32] Cox, *Current Problems in the Law of Grievance Arbitration*, Rocky Mt. L. Rev. 247, 248 (1958).

[33] Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1121 (1950).

tion still remains whether the *Union* is the proper party to enforce them. We think it is not.

Interscience's contract with the Union recognized the Union as bargaining agent only for the bargaining unit defined therein, namely, Interscience's "clerical and shipping employees" located at 250 Fifth Avenue or at "any branch of said location" thereafter opened by Interscience in the New York area (Sec. 1.1; R. 11-12). The Union represented only that bargaining unit and has not been authorized to represent any other.

The Interscience bargaining unit, consisting of 40 Interscience employees, disappeared on October 2, 1961, when it was integrated into the larger bargaining unit of Wiley employees. With the disappearance of the Interscience bargaining unit, the bargaining agency of the Union terminated. *Hooker Electrochemical*, 116 N.L.R.B. 1393 (1956); *L. B. Spears & Co.*, 106 N.L.R.B. 687 (1953); *Administrative Decision of General Counsel, Case No. K-346*, 37 LRRM 1472 (1956); *Administrative Decision of General Counsel, Case No. SR-1446*, 48 LRRM 1519, 1961 CCH NLRB ¶ 10,287.[24]

At the same time the Union's right to enforce the contract on behalf of the employees likewise terminated. *Retail Clerks* v. *Montgomery Ward & Co.*, —— F. Supp. ——, 45 CCH Lab. Cas. ¶ 17,735 (N. D. Ill. 1962), affirmed

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[24] Until the commencement of these proceedings, four months after the merger, the disappearance of the bargaining unit and the resulting termination of the Union's agency was never seriously disputed by the Union. It has never sought to impose on Wiley the contract provisions with respect to such basic union institutions as the union shop and the union hiring hall. It has not challenged Wiley's refusal to recognize it as the representative of any of Wiley's employees or to bargain with it on that basis. It has not denied the obvious fact that the former Interscience employees have been integrated into the Wiley operations and no longer form a separate bargaining unit, nor has the Union asserted that it represents any appropriate bargaining unit within the Wiley establishment.

—— F. 2d ——, 47 CCH Lab. Cas. ¶ 18,232 (7th Cir. 1963); *Glendale Manufacturing Co.* v. *Garment Workers, Local 520*, 283 F. 2d 936 (4th Cir. 1960), cert. den. 366 U. S. 950 (1961); *Kenin* v. *Warner Brothers Pictures, Inc.*, 188 F. Supp. 690 (S.D.N.Y. 1960); *Modine Manufacturing Co.* v. *Machinists*, 216 F. 2d 326 (6th Cir. 1954).

In *Kenin* v. *Warner Brothers Pictures, Inc., supra*, a union which formerly represented Warner's employees sought to enforce a provision of an expired collective bargaining agreement which provided that Warner could not exploit certain movie sound tracks on television "during the life of the Agreement or thereafter" without obtaining the union's consent in the form of a negotiated agreement. The employees involved were at the time of the action represented by a second union, not a party to the proceedings. The court dismissed the complaint, holding the first union an intruder in a collective bargaining situation in which it was not the designated representative.

In *Modine Manufacturing Co.* v. *Machinists, supra*, it was expressly held that a union may not enforce a collective bargaining agreement to which it is a party after it is no longer the authorized representative of the bargaining unit.

In *Glendale Manufacturing Co.* v. *Garment Workers Local 520, supra*, an arbitrator had issued an award directing the employer to negotiate a wage increase for the last five months of an expired collective bargaining agreement. The union was subsequently decertified. The court refused to enforce the award, even though the negotiations pertained to the period when the union had been authorized to represent the employees, since the union was not authorized to represent the employees at the time the negotiations would take place.

In *Retail Clerks* v. *Montgomery Ward & Co., supra*, the unions sued under Sec. 301 for specific performance of un-

expired collective bargaining contracts. The unions had earlier been decertified but no other union had been certified in their place. In dismissing the complaint, the District Court said:

> "Since employees have a right to vote for no union as well as for union representation, the contracting union will lose its contractual rights where no new union representative is chosen in the same manner as where a rival union is selected." (45 CCH Lab. Cas. ¶ 17,735, at p. 27,208.)

The Court of Appeals affirmed, saying that:

> "Any right to recognition as bargaining agent, which the plaintiff unions secured by virtue of their contracts, ceased and became inoperative on decertification. • • • An implied condition of the contracts was the continuance of that status as such certified representative." (47 CCH Lab. Cas. ¶ 18,232, at p. 28,954.)[35]

The Court below distinguished *Glendale*, *Modine* and *Kenin* by saying that there was no showing here that the Union had been decertified or that there was a rival union or that the freedom of choice of any employee would be infringed by the Union's pressing of the employee claims (R. 96).

We think the distinction is not sound. *Kenin*, *Modine* and *Glendale* were cases involving a second union but *Montgomery Ward* was not. As we read those cases, the decisive factor was not that a new union had been certified or that the old union had been decertified or that a rival union was asserting claims. The decisive factor, common to each, was that the Union's authority to represent the

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[35] It also said: "We do not reach the question of whether the employees (or some later certified bargaining representative) may enforce such provisions of these contracts" (*ibid.*).

bargaining unit had *terminated*. The common strain that runs through the cited cases and the case at bar is that the Union lost its collective bargaining agency, losing it either because of displacement by another union, or by decertification, or as here by merger of the bargaining unit into a larger unit.

The Court said it could see no reason why the Union should not enforce arbitration in the employees' behalf because "there appears to be no other person or entity in a position legally to [do so]" (R. 96). There are several answers to this. The Court assumes a present employee grievance whereas there is none. And it overlooks that if at a later date an employee has a grievance, he will be able either directly or through his then acting collective bargaining agent to assert it against the Company.[34]

Arbitration "is part and parcel of the collective bargaining process itself". *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 564, 578 (1960). Since the Union cannot negotiate new terms of employment for the employees it formerly represented, it should not be allowed to accomplish the same end by arbitration.

We have discussed this Point from three different aspects: that there is no obligation express or implied on Wiley's part to recognize the Union or its contract with Interscience; that the claims tendered for arbitration by their nature are not arbitrable under that contract; and

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[34] The provision in the agreement that the Union shall have the sole right to enforce the employees' rights (see 17.0; R. 30-31) obviously is intended to apply only while the Union remains as collective bargaining agent for the employees.

that the Union in any event is not in a position to assert them. There is really only one question presented, however, and that is whether the Union, now *functus officio*, can arbitrate for the employees it formerly represented the conditions under which they are to work in the Wiley enterprise.

But how can Wiley arbitrate these issues with the Union which does not represent the bargaining unit? How can the job security and grievance provisions of the Interscience contract be carried over to or be enforced in the larger Wiley unit without requiring Wiley to recognize the Union? How can seniority rights, which are a measure of the employee's relative standing within the group, be established for only a few members of the group? How can working conditions tailored for one Company be carried over to an entirely different bargaining unit in an entirely different company?

And what happens to the rights, if they are recognized, if a union other than the plaintiff should be designated as the employees' representative and should negotiate an agreement with different seniority and security and grievance procedures? And who is to police and enforce these "rights" while the Wiley unit remains unrepresented?

What Interscience's commitments to its employees might have been had Interscience not merged into Wiley, or what the Union's position vis-a-vis Wiley would have been had the Interscience bargaining unit remained separate and distinct in the Wiley establishment, are not the questions presented here. And what the Union's position vis-a-vis Wiley would have been were it asserting a grieved employee's claim for injury done to him while he was working in the Interscience establishment is also not the question here.

The single indivisible question, different in the whole from the sum of the parts, is whether Wiley can be com-

pelled to arbitrate with the Union the particular claims which it asserts. We think for all the reasons stated, and for the overriding reason that the Union's claim runs counter to all established concepts of employer-employee rights and relations, that the answer must be clearly no.

POINT III

The Court should have determined whether the Union had complied or was excused from complying with the conditions precedent to Interscience's promise to arbitrate and should not have referred these questions to the arbitrator.

The conclusion that the court and not the arbitrator must determine whether there are conditions precedent qualifying the promise to arbitrate and if so, whether they have been performed or excused inevitably follows from the principle, recognized and approved by this Court, that the obligation to arbitrate is contractual in nature, and that Congress by Section 301 of the Labor Management Relations Act has assigned the federal courts the duty to determine whether a contract exists and if so, whether it has been breached.

A breach of contract is a "failure, without legal excuse, to perform any promise which forms the whole or part of a contract". 5 Williston, *Contracts*, § 1288 at page 3672 (Rev. Ed. 1937). There can be no breach of a promise until all conditions qualifying it have been performed. "If the condition is not fulfilled, the right to enforce the contract does not come into existence." 5 Williston, *Contracts*, § 663 at page 127 (3rd Ed. 1961).

Wiley has contended from the commencement of this litigation that the obligation to arbitrate contained in the Interscience contract was clearly qualified by conditions precedent with which the Union had not complied and, if

only for that reason, that it was under no obligation to arbitrate. This was expressly so held by the District Court. The Court of Appeals held that the issue was for the arbitrator."[37]

The question of "arbitrability", whether "substantive" or "procedural", is simply whether a party is contractually obligated to arbitrate the issues tendered. Whether the reluctant party need not arbitrate because it did not agree to arbitrate the issues tendered, or whether it agreed to arbitrate them, but only upon compliance with specified conditions precedent, does not change the essential nature of the inquiry which must be made by the court in an action under Section 301—has the defendant breached his promise to arbitrate?"[38]

The federal and state courts have divided on the question of so-called procedural arbitrability. We list some of the cases below.

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[37] The Court of Appeals did not pass on the question whether the procedural requirements constituted a condition precedent to the obligation to arbitrate. Judge Medina apparently assumed that "adherence to the grievance and arbitration procedure" was a condition precedent, but held that a decision as to whether there was such adherence was to be decided by the arbitrator (R. 101). Judge Kaufman stated that the arbitrator was to determine "whether the Union had to comport with the three-step grievance procedure, and if so, whether it did in fact comport with it or was relieved from doing so" (R. 110). This question is discussed below.

[38] To support its holding that the court need not decide "procedural" arbitrability, the Court below quotes (R. 103) the following language from *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568:

> "[The function of the Court] is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

However, in that case this Court was stating a rule by which the *court* is to determine *whether* a dispute is to be referred to arbitration. The Court of Appeals has erroneously read this statement as bearing on the entirely different issue here presented, which is whether the *court or the arbitrator* is to determine whether the dispute is to be arbitrated.

For the Court:

First Circuit: *Boston Mutual Life Insurance Co.* v. *Insurance Agents International*, 258 F. 2d 516 (1958); *General Tire & Rubber Co.* v. *Local 512, United Rubber Workers of America, AFL-CIO*, 191 F. Supp. 911 (D.R.I. 1961), affirmed 294 F. 2d 957 (1961); *Local 901* v. *General Electric Co.*, 171 F. Supp. 886 (D. Mass. 1959).

Second Circuit: *Black-Clawson Company* v. *Machinists, Lodge 355*, 212 F. Supp. 818 (N.D.N.Y. 1962), at p. 823, affirmed on other grounds, 313 F. 2d 179 (1962).[39]

Seventh Circuit: *Brass & Copper Workers* v. *American Brass Co.*, 272 F. 2d 849 (7th Cir. 1959), cert. denied, 363 U. S. 845 (1960), petition for rehearing denied, 364 U. S. 856 (1960); *Grocery & Food Products Warehouse Employees, Local 738* v. *Thomson & Taylor Spice Co.*, 214 F. Supp. 92 (N. D. Ill. 1963).

Eighth Circuit: *International Union of Operating Engineers* v. *Monsanto Chemical Co.*, 164 F. Supp. 406 (W. D. Ark. 1958).

Ninth Circuit: *United Brick & Clay Workers* v. *Gladding, McBean & Co.*, 192 F. Supp. 64 (S. D. Calif. 1961).

Tenth Circuit: *Truck Drivers* v. *Grosshans & Petersen*, 209 F. Supp. 164 (D. Kan. 1962).

New York: *Matter of Board of Education* [*Heckler Electric Co.*], 7 N. Y. 2d 476, 199 N.Y.S. 2d 649, 166 N. E. 2d 666 (1960) (citing *Boston Mutual* with approval); *Local 459, International Union of Electrical Workers* v. *Remington Rand*, 19 Misc. 2d 829, 191 N.Y.S. 2d 880 (Sp. Term N. Y. Co. 1959).

Ohio: *Vulcan-Cincinnati, Inc.* v. *Steelworkers*, 173 N. E. 2d 709 (Ohio App. 1960).

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[39] The rule in the Second Circuit has of course been changed by the decision of the Court of Appeals in the instant case, which it shortly thereafter followed in *General Electric Company* v. *Carey*, —— F. 2d ——, 47 CCH Lab. Cas. ¶ 18,151 (2d Cir. 1963), petition for certiorari filed (Oct. 1963 Term, Docket No. 114).

For the Arbitrator:

Third Circuit: *Radio Corp. of America* v. *Association of Professional Engineering Personnel*, 291 F. 2d 105 (3d Cir. 1961); *Philadelphia Dress Joint Board* v. *Sidele Fashions, Inc.*, 187 F. Supp. 97 (E. D. Pa., 1960); *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 188 F. Supp. 225 (W. D. Pa. 1959), affirmed, 283 F. 2d 93 (3d Cir. 1960); *United Cement Workers International Union, AFL-CIO* v. *Allentown-Portland Cement Co.*, 163 F. Supp. 816 (E. D. Pa., 1958) (purporting to apply state law); *Insurance Agents International Union, AFL* v. *Prudential Ins. Co.*, 122 F. Supp. 869 (E. D. Pa. 1954) (purporting to apply state law).

Fifth Circuit: In *International Association of Machinists* v. *Hayes Corp.*, 296 F. 2d 238 (1961), petition for rehearing denied, —— F. 2d ——, 47 CCH Lab. Cas. ¶ 18,257 (1963), cited by the Court of Appeals (R. 102), the Court determined that the union's claim was procedurally arbitrable, and did not, as the Court of Appeals in the case at bar has done, submit this issue to the arbitrator. However, in *Deaton Truck Line, Inc.* v. *Teamsters, Local 612*, 314 F. 2d 418 (1962), without discussion, it held that the issue was for the arbitrator.

Sixth Circuit: *Electrical Radio & Machine Workers, Local 748* v. *Jefferson City Cabinet Company*, 314 F. 2d 192 (1963), petition for certiorari filed (Docket No. 104, Oct. 1963 Term).[40]

California: *Hammond* v. *Maier Brewing Co.*, 47 CCH Lab. Cas. ¶ 50,865 (Cal. Super. Ct., Los Angeles Co. 1963).

New Hampshire: *Southwestern New Hampshire Transportation Company* v. *Durham*, 102 N. H. 169, 152 A. 2d 596 (1962).

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[40] However, in *Local 971, United Automobile Workers AFL-CIO* v. *Bendix-Westinghouse Automotive Brake Co.*, 188 F. Supp. 842 (N. D. Ohio, 1960), cited by the Court of Appeals (R. 102), the court was not presented with, nor did it indicate an opinion as to, the question of "procedural arbitrability" as that term is used in this case.

The position adopted by the Court of Appeals has been advanced by Professor Cox in his article, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1510 (1959). Professor Cox, after stating that "the court must decide whether the defendant has broken a promise to arbitrate" said that this does not require the court to decide questions involving compliance with the grievance procedure. *Ibid.*, pages 1508, 1510. He argues that such questions involve merely a dispute about the interpretation or application of the contract which "a fortiori" is for the arbitrator to decide. However, as he himself points out, the same argument had been made with respect to the scope of the arbitration clause itself (*ibid.*, pp. 1508-9),[41] and was rejected on the ground that the court is called upon to enforce a contractual undertaking and necessarily therefore must determine the scope of that undertaking.[42]

The same reasoning logically must apply to inquiries concerning the existence of and compliance with conditions precedent. Because the obligation to arbitrate is contractual, the court and not the arbitrator must decide whether the conditions to the promise to arbitrate have been complied with, and if not, whether compliance was excused.

The Court of Appeals reasoned that the parties had bargained for a determination by an arbitrator of the issues between them, and therefore an issue as to compliance with the grievance procedure should be decided by the arbitrator (R. 104). However, a dispute over compliance with the grievance procedure does not have the independ-

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[41] See also, for example, Gregory, *The Law of Collective Agreement*, 57 Mich. L. Rev. 635, 647-649 (1959).

[42] See page 23, *supra*. Also see *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 571 (concurring opinion):

> "Since the arbitration clause is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator. But the court rejects this position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary."

ent significance of, for example, a dispute over working conditions or disciplinary measures. It is significant only insofar as it affects the right to arbitrate the substantive issues between the parties. It is, in effect, merely a dispute over the meaning of the arbitration clause, which "unless the parties clearly state to the contrary" is for the Court. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 571 (1960).

The Court of Appeals was also concerned that committing the issue of so-called "procedural arbitrability" to the courts would enable the reluctant party to unduly delay arbitration.[43] The same opportunity for delay is open to any party by a challenge to the substantive arbitrability of the issues tendered for arbitration. The speedy resolution of grievances is generally as much desired by employer as by union, but it is nevertheless of vital importance to each that if the grievance and arbitration provisions are to be resorted to, they be invoked clearly and promptly, and before the other party has substantially changed its position.[44]

We do not contend that all of the steps of a grievance procedure or the time limitations to which they are sub-

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[43] In illustration, it pointed to the "miscellany" of contentions advanced by Wiley in the case at bar (R. 105). These contentions, upon examination, are merely a recitation of the contract grievance procedures ignored by the Union which sought to negotiate rather than to grieve and arbitrate.

[44] In the instant case, Wiley substantially changed its position as a result of the Union's failure to invoke the grievance and arbitration provisions of the contract and its reliance upon negotiations instead. This change in position is found not only in the consummation of the merger, as stated by Judge Sugarman (R. 56), but also, by Wiley's actions in (1) incorporating the Interscience employees into its Pension Plan and funding their past service with Interscience (R. 87); (2) retaining all former Interscience employees who wished to continue in the employ of Wiley (R. 61); and (3) paying substantial voluntary termination payments to those Union employees who voluntarily left their jobs after the merger (R. 87).

ject are necessarily conditions precedent. Some may be promissory rather than conditional.

The distinction between a "promise" and a "condition precedent" is well established. See generally, Williston, *Contracts* § 665 (3rd Ed. 1961); 3A Corbin, *Contracts* § 633 (1960). "Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance depends upon the intent of the parties . . ." and this is to be ascertained from a fair and reasonable construction of the contract. Williston, *Contracts, supra*, § 663, at page 127.

If a court concludes that a procedural step (or the time limitation on such step) is merely promissory, it need go no further. The effect of failure to comply, or the validity of any excuse offered for such failure, is for the arbitrator to evaluate. Only as to those steps which the court finds are conditions precedent to the obligation to arbitrate need the court involve itself in "procedural arbitrability".[48] Where the parties choose to condition the obligation to arbitrate, the court's involvement to that extent is unavoidable. Otherwise, the court would ignore its judicial responsibility to determine whether the plaintiff has shown the defendant's failure to perform its promise to arbitrate.

The Court of Appeals refused to accept this responsibility. It did not "reach the merits of Wiley's contention that the Union did not comply with the procedural requirements of the collective bargaining agreement", but referred this question to the arbitrator (R. 107).

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[48] The term "procedural arbitrability" which is commonly used should be confined to the issue of whether the promise to arbitrate is qualified by any conditions precedent and if so, whether they have been performed or excused. It appears that the term is sometimes erroneously used to pose the broader question (which is not relevant to our case) whether the court or the arbitrator is to determine the consequences of a failure to comply with the grievance procedure in all cases, regardless of whether the steps of the procedure or the time limitations to which they are subject are conditional or merely promissory.

The District Court correctly held that the Union had "failed to avail itself of the procedures under the contract which were a condition precedent to arbitration" (R. 55). It also rejected the Union's contention that Wiley was estopped from asserting or had waived these conditions precedent. If this court concludes, as we here urge, that the issue is one for determination by the court and not the arbitrator, it may wish to remand the case to the Court of Appeals for review of the District Court's decision on the merits. However, because we believe that this is not mandatory and that this Court may direct affirmance of the District Court's conclusion, we will address ourselves to the merits of the issue presented.

Article XVI spells out the grievance procedures leading to arbitration. (R. 27-30, See pp. 14-15, *supra*.) It requires:

(1) That the affected employee or group of employees themselves raise the grievance directly with the Company;[46]

(2) That this be done not later than four weeks after its occurrence or latest existence, and that it be referred to arbitration within two weeks thereafter unless the time be extended in writing;

(3) That if the difference must be arbitrated, the parties make an effort to name a mutually acceptable arbitrator.

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[46] Interscience was a small company. The Union group, with a basic minimum of 26 (R. 39) and numbering no more than forty at the time of the merger, were clerical employees working in close contact with management. Their jobs, in the Union's own words, gave them "status and importance", and involved "responsibility", "challenge" and "intellectual response" (R. 66). It is understandable that the parties should have required that the grievance be discussed in the first instance by the affected employee and the shop steward with the Company.

These are the expressly stated conditions to the obligation to arbitrate. They are stated to be the "sole means" of adjustment of disputes of every nature. Failure to file the grievance (in writing, stating the nature of the claim and of the objections raised thereto) within the "time limitation" of four weeks is "to be construed and be deemed to be an abandonment of the grievance" (R. 29). The failure to make any effort to comply with any of them requires denial of the Union's suit to compel arbitration.

The Court of Appeals in referring the "procedural" question to the arbitrator indicated its belief that he might find that the Union had substantially complied with the required procedures or that Wiley had waived such compliance (R. 105). We think that no such inference was permissible.

The Court of Appeals said:

> "Thus Wiley claims the Union was required to follow Steps 1, 2 and 3, described in Section 16.0. The Union replies that these applied only to an 'affected employee' and not to the controversy in this case which affects the entire bargaining unit." (R. 105)

The Court misread the contract. Contrary to its statement elsewhere in the opinion, no distinction is made between ordinary grievances personal to individual employees and other and "more important disputes" relative to "matters affecting the entire bargaining unit" (R. 100). The quoted phrase with respect to the entire bargaining unit is not to be found in the contract."

The Court said:

> "The Union also points to the fact that there was an orderly exchange of views, and says this surely was a substantial compliance with the contract." (R. 105)

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[47] See footnote 8, page 17, *supra*.

This likewise is erroneous. The Union's discussions with the Company related only to rights asserted for the balance of the contract term. These issues are now moot. There was no exchange of views on issues relating to the period after January 31, 1962 which the Union now seeks to arbitrate.

The Court of Appeals said:

> "With respect to Wiley's claim that there was a failure to comply with the requirement of Section 16.6 that 'any grievance must be filed with the Employer and with the Union Shop Steward within four (4) [weeks*] after its occurrence or latest existence', the Union replies that the question here is not a 'grievance' but a 'dispute' or 'difference' arising out of the agreement and that this Section has no application to a dispute over such a broad question as to whether all the employees had 'vested' rights under the contract inextinguishable by unilateral action by the employer; and that to say this is a 'grievance' to be filed 'with the Employer and with the Union Shop Steward' borders on absurdity." (R. 105)

With due respect, we again say that the Court has misread the agreement. The Court overlooked the opening statement in Sec. 16.0 (R. 27) that the term "grievance" as used in Article XVI includes every kind of difference, grievance or dispute arising out of or relating to the agreement, or its interpretation, application or enforcement.

The Union excused its failure to comply with the grievance procedures by saying that the grievance machinery "was never intended to take care of a situation of this nature where a whole Company itself is affected", asserting that such procedures were only to cover "the small

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* The Court erroneously said "days".

grievance affecting a single employee" (R. 69). The Union's argument cuts both ways. The procedure outlined in the contract was the only procedure prescribed by the parties and was stated to be the sole means of determining all disputes. If the grievance procedure as so outlined did not apply to "a situation of this nature", the situation could not be arbitrable.

The Court said:

> "Moreover the Union contends that, if some sort of notice of the dispute was required within four weeks after its 'occurrence or latest existence', the letter of June 27, 1961 filed within four weeks after the Union learned of the proposed consolidation was such notice." (R. 105)

The Union's letter of June 27, 1961 (R. 57-58) merely referred to the right asserted for the employees "to continued employment"; called upon Interscience to see to it that the employees "are not terminated from employment", and warned that "any impairment of the rights of the employees will be resisted to the fullest possible extent under the law". Certainly, there is no suggestion to be found in this letter of the rights claimed by the Union for the period following the termination of the contract.

The Court inferred that the arbitrator might find that the dispute "was plainly a continuing one" and therefore not barred by the four-week limitation of time (R. 105). This confuses a violation of law with the breach of a contract. A continuing violation of the law (whether such violation constitutes a felony or an unfair labor practice) does not clothe the violator with immunity no matter how long the violation may continue. See, e.g., *Von Eichelberger* v. *United States*, 252 F. 2d 184 (9th Cir. 1958) (unlawful possession of firearms); *United States* v. *Guertler*, 147 F. 2d 796 (2d Cir. 1945), cert. den. 325 U. S. 879 (1945)

(failure to keep draft board notified of address); *N.L.R.B.* v. *Epstein*, 203 F. 2d 482 (3d Cir. 1953) (unfair labor practice).

In contrast, a continuing *breach of contract* does not suspend the operation of a statutory or contractual statute of limitations. The limitation period runs from the moment the breach of contract first occurs, whether or not the breach is "continuing". 6 Williston, *Contracts*, § 2004 (Rev. Ed. 1938).

Finally, the Court suggested that the arbitrator might find "a clear waiver of procedural requirements by Wiley" (R. 105).

This suggestion is without foundation. Waiver could be found only if the Union was led to believe that a statement of the issues to be arbitrated and an effort to choose an acceptable arbitrator would be purposeless or unnecessary, and if it failed to perform these conditions precedent because of this belief.[*] Certainly, nothing that Interscience or Wiley said or did can be said to have lulled the Union into a belief that compliance with the grievance procedures would not be insisted upon. The Union's own affidavits indicate that the Company never departed from its position that it would recognize the contract until the date of the merger and that thereafter it would regard the contract as ineffective. This was an invitation to the Union to commence proceedings, not a suggestion that it defer them.

It is equally clear that compliance with the grievance procedures would not have been useless or futile. They

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[*] 5 Williston, *Contracts* § 699 at page 352 (3rd Ed. 1961):

"* * *[I]t is essential that the promisor's conduct should be the cause of the promisee's failure to perform the condition. If the promisee could not or would not have performed the condition in any event, the manifestation of unwillingness or inability of the promisor to perform will not give rise to a cause of action because the promisee cannot allege and prove that he would have become entitled to receive performance by complying with the condition, had it not been for the promisor's misconduct."

were unilateral essential first steps to the framing of a controversy with the Company, and without them, there could be no obligation, nor breach of obligation, to arbitrate.

The complaint, in effect, demands arbitration of whether Wiley must commit itself, for the future, to the working conditions provided in the Interscience contract. These claims could just as well have been made, and arbitration demanded, in June, 1961 when the Union wrote to the Company, as in January, 1962 when the contract was about to expire. They certainly could have been made on September 19, 1961, two weeks before the merger, when the Company fully stated its position to the Union.

The Union chose not to arbitrate. It deliberately and intentionally took none of the steps preliminary to arbitration. Instead, it elected to negotiate. In choosing the one course, it surrendered the other. 5 Williston, *Contracts* § 683 (3rd Ed. 1961). Its suit for arbitration is frivolous and was properly dismissed by the District Court.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and the order of the District Court reinstated.

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